87-178

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

PACIFIC GAS AND ELECTRIC COMPANY,
a California Corporation
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTION PRESENTED

Does a state public utilities commission violate the Public Utility Regulatory Policies Act of 1978 and the Federal rules promulgated thereunder by requiring an electric utility to pay prices for electricity which exceed those prices authorized by the Act?

THE PARTIES TO THIS PROCEEDING

The parties to this proceeding are: (1) Pacific Gas and Electric Company* (hereinafter "PGandE") (Petitioner); (2) Public Utilities Commission of the State of California (hereinafter "CPUC" or "Commission") (Respondent); (3) Independent Energy Producers Association, Inc.; (4) Basic American Foods, Inc.; (5) GWF Power Systems Company; (6) California Agricultural Power Company; and (7) Ultrapower, Inc. (the real parties in interest).

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* PGandE is not owned by any parent company. The following is a list of PGandE's subsidiaries and affiliates and the percentage of each that PGandE owns: Pacific Indonesia LNG Company (50%); Standard Pacific Gas Line Incorporated (85.71%). PGandE has an indirect interest in Alberta Natural Gas Company Ltd, ANGUS Chemical Company, ANGUS Fine Chemicals Ltd., ANGUS Chemie GmbH., Ltd., and Rocky Mountain Gas Transmission Company through its wholly-owned subsidiary, Pacific Gas Transmission Company. Pacific Gas Transmission Company owns 49.23% of Alberta Natural Gas Company Ltd, 100% of ANGUS Petroleum Corporation, and 100% of Rocky Mountain Gas Transmission Company. Alberta Natural Gas Company Ltd owns 98.04% of ANGUS Chemical Company, and 49% of Foothills Pipe Lines (South B.C.) Ltd. ANGUS Chemical Company owns 85% of ANGUS Biotech, Inc., 100% of ANGUS Chemie GmbH., and 80% of ANGUS Fine Chemicals Ltd.

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PUBLIC UTILITIES COMMISSION OF THE
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Pacific Gas and Electric Company ("PGandE") respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court entered on April 29, 1987, which denied without opinion PGandE's petition for writ of review from three related decisions of the California Public Utilities Commission ("CPUC" or "Commission").

OPINIONS BELOW

The judgment of the California Supreme Court is not reported, but is reprinted in Petitioner's Appendix ("Pet. App.") at p. 1. The three unreported decisions of Respondent CPUC are Decision No. 86-10-038 issued October 16, 1986 (Pet. App., p. A-126); as modified by Decision No. 86-12-013 issued December 3, 1986 (Pet. App., p. A-141); and as further modified by Decision No. 86-12-104 issued December 22, 1986 (Pet. App., p. A-145).

JURISDICTION

Respondent California Public Utilities Commission issued its first decision on October 16, 1986, modified the decision on December 3, 1986, and denied rehearing, but further modified the decision, on December 22, 1986. The California Supreme Court denied petitioner's timely petition for writ of review on April 29, 1987. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257, subdivision (3).

This Petition is being docketed in this Court within 90 days from the denial below of the writ of review.

FEDERAL STATUTE INVOLVED

This case involves Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Title 16, United States Code, section 824a-3, subdivision (3). The text of Section 210 is set forth at (Pet. App., p. A-257.)

STATEMENT OF THE CASE

A. Introduction

This case arises from three related decisions of the Commission which ordered PGandE to amend more than 200 executed power purchase agreements to add new prices in excess of PURPA's maximum rate for the purchase of future power that PGandE does not need. The additional cost, which may well exceed $1 billion, will be borne by PGandE's ratepayers.

PURPA requires electric utilities to purchase electric power produced by cogeneration and small power production "qualifying facilities" ("QF"). Under Section 210(b) of PURPA, the purchase price may equal, but cannot exceed, the utility's cost of generating the power itself or purchasing it elsewhere. This cost is called the "incremental" or "avoided" cost. If properly determined, prices based on "avoided cost" assure that utility customers' rates will remain the same regardless whether the utility buys QF power or generates the power itself. When prices are allowed to exceed avoided cost, ratepayers are forced to subsidize QF developers, which is contrary to Section 210(b) of PURPA.

Section 210(f) of PURPA requires each state authority, which in California is the CPUC, to implement the rules promulgated by the Federal Energy Regulatory Commission ("FERC") pursuant to Section 210(a) of PURPA. (18 C.F.R. Part 292 (1987).) The CPUC has chosen to do so primarily through the creation of "standard offers" for power purchase agreements that a utility must make available to all QF developers. The CPUC ordered petitioner to amend more than 200 of these executed standard offer power purchase agreements to pay prices that substantially exceed current "avoided cost" projections.

The affected power purchase agreements are with cogeneration and small power production facilities that are QFs under the regulations of FERC which implement PURPA. Even though Section 210(b) of PURPA mandates that ratepayers not pay more for QF power than the cost of the utility's alternative resources, the Commission's orders nevertheless compel PGandE to pay new, fixed prices that exceed current projections of the cost of alternate resources to QFs who will not even begin operation until after 1987. Consequently, these new prices subsidize QFs at the expense of PGandE ratepayers. Moreover, the prices not only exceed the Commission's authority under PURPA but they flaunt the express terms of the power purchase agreements.

B. Section 210 Of PURPA

Enacted in 1978, PURPA was part of the President's initiative to combat the energy crisis. (*See American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402 (1983); *FERC* v. *Mississippi*, 456 U.S. 742, *reh'g denied*, 458 U.S. 1131 (1982).) Section 210 of PURPA encouraged the development of qualifying small power and cogeneration facilities by requiring electric utilities to purchase their electric output. To implement this policy, Section 210(a) of PURPA requires FERC to promulgate regulations whereby electric utilities must offer to purchase the power generated by qualifying facilities.

Section 210(b) of PURPA delineates the rates that a utility under Section 210(a) can be ordered to pay for qualifying facilities power. These rates, according to Section 210(b), "shall be just and reasonable to the electric consumers of the electric

utility and in the public interest" and "shall not discriminate against" qualifying facilities. The maximum rate that can be set under Section 210(b) is the "incremental cost to the utility of alternative electric energy" which is known as the "avoided cost." (*See also American Paper Institute Inc.* v. *American Electric Institute, supra*, 461 U.S. at 413; 18 C.F.R. § 292.304(a)(1987).)

Section 210(f) of PURPA requires state utility regulatory commissions, such as the CPUC, to implement FERC's rules issued pursuant to Section 210(a). State commissions "may comply with this requirement by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." (*FERC* v. *Mississippi, supra*, 456 U.S. at 751.)

On February 19, 1980, FERC issued its rules pursuant to Section 210(a) of PURPA. (45 Fed. Reg. 12214, *codified at* 18 C.F.R. Part 292 (1987).) Those rules require electric utilities to offer to purchase electric energy from qualifying cogeneration and small power production facilities at a rate equal to the purchasing utility's full avoided cost. (18 C.F.R. § 292.304(b)(2)(1987).) This Court has upheld the validity of FERC's full-avoided-cost rule, but it emphasized that "PURPA sets full avoided cost as the maximum rate that [FERC] may prescribe." (*American Paper Institute, Inc. v. American Electric Power Service Corp., supra*, 461 U.S. at 413.)

C. The CPUC's Implementation Of FERC's Section 210(a) Rules And Approval Of Interim Standard Offer No. 4

On September 3, 1980, the CPUC issued Order Instituting Rulemaking (OIR) 2 for the purpose of complying with PURPA's requirement that each state regulatory authority begin to implement the FERC rules within one year of their issuance. (16 U.S.C. § 824a-3(f)(1); Dec. No. 82-01-103, 8 Cal. P.U.C. 2d 20 (1982).) The CPUC chose to implement the FERC rules by creating a series of "standard offers" for power purchase agreements which the utility is required to make available to all QFs. Under these standard offers, a utility cannot refuse any QF, alter any standard offer term except at a QF's specific request, or even limit the number of standard offers which are signed. In

other words, a utility can do no more than ensure that a QF has filled in the blanks and signed the offer. (Dec. No. 85-06-163, slip op. at 24-25, 29 (Cal P.U.C., June 21, 1985).)

In 1983, the Commission approved negotiated Interim Standard Offer No. 4 ("interim SO4"), which offered long-term fixed energy and capacity prices on an interim, experimental basis. (Pet. App., p. A-186.) Interim SO4 differed from its predecessor standard offers in two important aspects. First, it allowed QFs to lock into fixed, forecasted avoided cost prices rather than rely on the fluctuating, actual avoided cost prices for both energy and capacity.[1] Second, interim SO4 was developed through negotiations between interested parties facilitated by the Commission's staff; and no evidentiary proceedings of any kind were ever conducted.[2] The negotiated interim SO4 had a menu of pricing options from which QFs could choose. Three of them are pertinent.

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[1] Electrical power is viewed as having two components, capacity and energy. "Capacity" refers to the capability of a generating facility to produce a specified amount of electrical energy at an instant in time. Capacity is measured in multiples of watts (kilowatts ("kw") or megawatts ("mw")). It is analogous to the horsepower of an engine. A one megawatt facility is capable of supplying the electrical needs of about 1,000 households. "Energy" is the electricity actually delivered to customers. It is measured in terms of volume (watts) and time (hours) and is often expressed in kilowatt-hours ("kwh"). Energy payments are generally based on the variable costs of generating the energy, primarily fuel costs, while capacity payments are generally based on the fixed costs of the capacity, such as construction costs.

[2] The CPUC had earlier approved three standard offers. Standard Offer No. 1 ("SO1") was for the purchase of "as-delivered" capacity and energy based on fluctuating, actual avoided cost prices. Standard Offer No. 2 ("SO2") was for the purchase of "firm" capacity from QFs capable of operating reliably during the utility's peak demand periods. SO2 offered fixed, levelized capacity prices, and the same actual avoided cost energy prices offered under SO1. Standard Offer No. 3 ("SO3") was for the purchase of as-delivered capacity and energy, both at actual avoided cost prices, from small QFs of 100 kilowatts or less. (*See* Dec. No. 82-01-103, 8 Cal. P.U.C. 2d 20 (1982); Dec. No. 82-12-120, 10 Cal. P.U.C. 2d 20 (1982).)

First, Energy Payment Option 1 allowed QFs to be paid for energy for up to ten years based upon the fixed prices set forth in Table B-1. (Pet. App., p. A-210.) Table B-1 contained fixed annual prices for energy deliveries in years 1983 through 1997. Thus, a QF could begin to operate as late as 1987, four years after interim SO4 was approved, and still receive ten full years of guaranteed prices.

Second, interim SO4 allowed QFs capable of operating reliably during PGandE's periods of greatest electricity demand to be paid fixed prices for "firm" capacity. These were constant, levelized prices to be paid for the term of the agreement which, at the QF's option, could range from 15 to 30 years. The exact price depended on both the term of agreement and the date on which the QF demonstrated its ability to provide reliable capacity. This date was called the "firm capacity availability date." Table E-2 provided annual prices for firm capacity availability dates for years 1982 through 1987 only. (Pet. App., p. A-238.)

Third, QFs unable or unwilling to commit to firm capacity had the option to be paid fixed prices for their "as-delivered" capacity. Table D-2 contained fixed annual prices for years 1983 through 1997. (Pet. App., p. A-230.)

On the basis of the utilities' amended applications, which presented each utility's negotiated version of interim SO4, the Commission approved interim SO4 in Decision No. 83-09-054 issued on September 7, 1983. In that decision the Commission clearly stated:

> The most critical aspect of this process is that *each agreed upon standard offer resulting from the negotiating conference is presented to us on a take-it-or-leave-it basis.* Each was truly negotiated as a "package," comprised of cost forecasts, prices, and contract terms, etc. *We are, at this juncture, without an evidentiary record* upon which to weigh various proposals and adopt a standard offer reflecting a careful weighing of various components. *Essentially, then, we face either accepting or rejecting each of the three standard offer payment options as negotiated, and we do not, in*

> *fairness to the parties, have the latitude to make modifications.* (Pet. App., p. A-9.) (Emphasis added.)

The Commission also made clear that:

> Those who contract under interim Standard Offer #4 will *not be subject to having terms or prices changed later*, except as narrowly and specifically ordered by this decision. *Any changes made to this standard offer in the future will only apply to those contracting after such changes.* (Pet. App., p. A-4.) (Emphasis added.)

Although it could have done so, the Commission nevertheless refused to approve a continuing regulatory authority clause. Instead, it specifically recognized that it would have no authority to "order retroactive changes" to signed interim SO4 power purchase agreements. (Pet. App., p. A-32.) The Commission then approved without change the three price provisions described above. It did not, however, adopt any specific standard or methodology for determining either energy or capacity prices; rather, it simply approved the specific sets of numbers contained in PGandE's application. (Pet. App., pp. A-20-A-22.) The Commission specifically stated in Finding of Fact 2:

> The amended applications in these proceedings, with the changes noted on the record during the second prehearing conference, contain Standard Offer #4. That standard offer, and three payment options under it, are acceptable to the respective utilities, QFs, and staff, for interim use. (Pet. App., p. A-44.)

The CPUC's sole Conclusion of Law states:

> *The standard offers filed by the applicant utilities should be ratified for use* by utilities and QFs in contractual power purchases, as authorized and restricted by the following order. (*Id.*) (Emphasis added.)

Finally, Ordering Paragraph 1 provides:

> 1. *Standard Offer #4, Payment Options #1 through #3, as proposed by the Pacific Gas and Electric Company*

> (PGandE), San Diego Gas and Electric Company (SDG&E), and Southern California Edison Company (Edison), *shall be used by those utilities until further order of this Commission, but, in any event, for a minimum of six months and for a maximum of two years after the effective date of this order. (Id.) (Emphasis added.)*

Decision No. 83-09-054 limited the availability of interim SO4 to a maximum of two years. It further limited use of two payment options—Energy Payment Options 2 and 3—to a maximum one-year period "due to reservations about whether longer provision for these options would be in the public interest." (Dec. No. 85-04-075, slip op. at 5 (Pet. App., p. A-65).) The Commission ultimately made interim SO4 available for a longer period than it had originally anticipated. But the Commission never revised either the fixed prices or the fifteen-year forecast adopted in Decision No. 83-09-054.

D. Because Of The Overwhelming QF Response To Interim SO4 And The Decline In Oil And Gas Prices, The Commission Suspended Interim SO4 In April 1985

Although asked to do so, the Commission twice specifically refused to alter the price provisions of interim SO4 in any way whatsoever. In Decision No. 83-12-050, slip op. at 4 (Pet. App., p. A-53), issued two days before PGandE's 1984 Test Year General Rate Case decision, the Commission observed:

> Standard Offer No. 4, along with the energy price, incremental energy rate and shortage value forecasts adopted by D. 83-09-054 has become effective. *New incremental energy rates and/or avoided capacity cost values that may be adopted by the Commission in general rate case or ECAC proceedings will not affect the price forecasts* established over the fixed payment term *under Standard Offer No. 4, until further orders are issued* in this proceeding. (Emphasis added.)

Moreover, continued the Commission:

> We trust there will be no further petitions for modification of that decision, as *parties should raise any concerns or propos-*

> *als relating to Standard Offer No. 4 at the upcoming evidentiary hearing.* (*Id.*) (Emphasis added.)

In Decision No. 84-08-035 issued August 1, 1984 (Pet. App., p. A-56), the Commission extended the availability of Energy Payment Options 2 and 3, which were otherwise due shortly to expire. Independent Energy Producers Association, Inc. ("IEP"), a QF trade organization, requested that Energy Payment Option 3 be modified based on information developed in the utilities' most recent general rate cases. But the Commission denied that request:

> We will not, however, amend Payment Option No. 3 in any way. That payment option was part of the negotiated package which the Commission approved in D. 83-09-054. *A change in one term would require the reexamination of all other terms of the standard offer.* We prefer to maintain the status quo and adopt modifications to Standard Offer No. 4 following the evidentiary hearings now scheduled in this proceeding. We also note that a QF who finds the terms of interim Standard Offer No. 4 unacceptable may in fact negotiate a separate contract. (Pet. App., pp. A-58-59.)

The extended availability of Energy Payment Option 3, however, proved short-lived. Only three months later, in Decision No. 84-10-098 issued October 17, 1984, the Commission suspended the availability of Energy Payment Option 3 for QFs over 50 megawatts. The *ex parte* suspension was prompted by the Commission's concern that over 1,800 megawatts of interim SO4s had already been signed, while large numbers of new projects loomed.

The suspension decision unleashed what became known as the "gold rush". (*See, e.g.*, Dec. No. 85-04-075, slip op. at 18 (Pet. App., p. A-83).) Because of the uncertainty over the continued availability of the interim SO4 high fixed prices, unprecedented numbers of QFs began to sign interim SO4 agreements. By December 31, 1984, QFs totaling 6,593 megawatts had executed standard offers with PGandE, primarily interim SO4. (Dec. No. 85-04-075, slip op. at A-19 (Pet. App., p. A-117).) Yet, PGandE's resource plan showed a need for only 2,829 megawatts

of QF capacity through year 2004. (*Id.* at A-21 (Pet. App., p. A-119).)

Finally, on April 17, 1985 in Decision No. 85-04-075, the Commission temporarily suspended interim SO4 in its entirety for all QFs. (Pet. App., p. A-61.) The Commission noted that the rapid rate at which QFs had signed interim SO4 with PGandE indicated that "the overall pricing terms, including both capacity and energy provisions, may be seen as very favorable by QFs." (*Id.*, slip op. at 16 (Pet. App., p. A-81).) The Commission concluded in Finding of Fact 22 that:

> Under the present terms of interim SO4, there is a reasonable probability that the utilities and their ratepayers are paying too great a price for QF electricity. (Pet. App., p. A-102.)

The Commission's analysis did not include any interim SO4s executed after December 31, 1984. (Pet. App., p. A-89.) In fact, more than 2000 megawatts of additional interim SO4s were signed after that date. On July 10, 1985, the Commission made the interim SO4 suspension permanent.[3] (Dec. No. 85-07-021).

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[3] The California Energy Commission recently summarized the situation that now faces California utilities, including especially PGandE:

> [T]he state's major utilities face substantial additional capacity surpluses for the next decade. Nor can the utilities continually absorb energy production from additional power plants; instead, there is an increasing tendency of new must-run QFs to displace energy generation from utility resources that are either less expensive to operate or never intended to be curtailed to any significant extent, or both. (1986 Electricity Report, p. 5-52.)

The California Energy Commission ("CEC") adopted this report on December 17, 1986, and modified it on January 20, 1987. As mandated by California Public Resources Code § 25308, the report presents the CEC's adopted electrical forecast for use in planning and approval of new electrical resource additions in California. PGandE asked the California Supreme Court to take judicial notice of the findings of this report pursuant to California Evidence Code §§ 452, 459.

E. Proceedings Below

In August 1986, several QFs, who had signed interim SO4 shortly before its suspension, petitioned the Commission to modify its original 1983 decision approving interim SO4. They asked the Commission to order PGandE to add new fixed energy and capacity prices to their interim SO4's so that they could begin operations after 1987 and still retain a full set of high fixed prices. In other words, they wanted these new fixed prices calculated not from current estimates of avoided cost, but from escalation of the original price schedules, which are two to four times higher than current projections of avoided cost.

The Commission held no evidentiary proceedings to consider the petitions. Instead, based on the QFs' petitions and the responses of interested parties, including PGandE, the Commission, on October 16, 1986, issued Decision No. 86-10-038. (Pet. App., p. A-126).) That decision ordered PGandE to amend all its interim SO4 power purchase agreements to add new, additional fixed prices for firm capacity based on escalation of the original fixed price schedule. The new firm capacity prices, however, were made available only to QFs who had predicted operation dates after 1987 in their interim SO4's. It also refused to alter the energy or as-delivered capacity prices.

The Commission made no attempt to determine whether the new prices in fact represented PGandE's avoided cost. To the contrary, the Commission had already previously concluded there was a "reasonable probability" that such prices would exceed avoided cost. (Dec. No. 85-04-075, slip op. at 31 (Pet. App., p. A-102); *Accord* Dec. No. 87-01-049, slip op. at 8 (Pet.App., p. A-254.).) Concerned about this huge overpayment to QFs, PGandE requested a rehearing based in part on the argument that the Commission's order violated both PURPA and the FERC rules.

The hundreds of gold rush interim SO4s signed in the last days of that offer's availability aggravated, if not caused, the situation the CEC described. The same gold rush interim SO4s are the least likely to begin operation by the end of 1987. Thus, the gold rush interim SO4s are the most likely to benefit from the new fixed prices.

On December 2, 1986, while PGandE's application for rehearing was pending, the Commission on its own motion, again without hearing, modified its prior decision to give the new, escalated firm capacity prices to all QFs with interim SO4, irrespective of their scheduled operation date. (Dec. No. 86-12-013 (Pet. App., p. A-141).)

Finally, on December 22, 1986, the Commission issued Decision No. 86-12-104, denying PGandE's petition for rehearing of the new firm capacity prices. (Pet. App., p. A-145.) The Commission reversed its earlier refusal to change the prices for energy and as-delivered capacity. Instead, it ordered PGandE to add new fixed energy and as-delivered capacity prices as well.

A timely petition for writ of review was filed with the California Supreme Court, which denied the petition without opinion on April 29, 1987. (Pet. App., p. A-1.)

THE FEDERAL QUESTION WAS RAISED BELOW

At the earliest possible stage of this proceeding, petitioner raised the federal issue. (Pet. App., p. A-168.) Among the grounds for the petition for a writ of review to the California Supreme Court was that Decision No. 86-10-038, as modified by Decision No. 86-12-013, and Decision No. 86-12-104, was unlawful because: "federal law prohibits the Commission from ordering PGandE to purchase power from qualifying facilities at prices in excess of avoided cost. (U.S. Const. art. VI, clause 2 (Supremacy Clause); Section 210(b) of PURPA, 16 U.S.C.A. § 824a-3(b); 18 C.F.R. § 292.304(d)(1986).)"

REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL AND THE WRIT SHOULD THEREFORE BE GRANTED

I

AN IMPORTANT FEDERAL ISSUE THAT IS NATIONAL IN SCOPE IS RAISED BY THE DECISION BELOW

A. The Decision Below Raises A Recurring Federal Issue Concerning The Implementation Of PURPA

1. Introduction

The decision below raises the important national question whether in implementing PURPA a state regulatory commission can order an electric utility to pay the developers of qualifying facilities prices that exceed avoided cost forecasts, despite the clear language of Section 210(b) of PURPA which establishes avoided cost as the maximum rate a utility can be compelled to pay in implementing PURPA. For three reasons the question raises an important national issue which should be resolved by this Court.

2. Because PURPA Is A Key Part Of National Energy Policy, It Must Be Implemented Correctly

Not only is PURPA a key part of national energy policy, it is also a catalyst in making the electric utility business an increasingly competitive industry. As FERC recently noted:

> Wholesale electricity markets are becoming more competitive due to economic and technological changes. . . .
>
> Utilities are now vying against each other for sales to other utilities and to large customers. Independent generators are entering bulk power markets at both large and small scales. Distributors and large industrial customers are actively searching for new lower cost suppliers. *Pacific Gas and Electric Company*, 38 FERC ¶ 61,242 (1987).

PURPA was designed to foster competition within the industry by eliminating perceived institutional barriers to the development of non-utility, decentralized power production. It was never in-

tended to subsidize the development of cogeneration and small power producers. Interpreting PURPA as authorizing prices that exceed avoided cost not only subsidizes independent power producers contrary to congressional intent, but it also creates severe distortions in the increasingly competitive bulk and retail power markets that could adversely affect the utility industry for many decades.

3. Improper Implementation Of PURPA Will Cause Utility Customers To Pay Excessive Rates

Although Section 210(b) of PURPA declares that power purchase rates "shall be just and reasonable to the electric consumers of the electric utility" (16 U.S.C. § 824a-3(b)(1)), rates ordered by the CPUC which are above avoided cost will result in utility consumers paying QF developers payments that greatly exceed the actual value of the QFs' generation. This is highly unfair to utility customers who are already burdened with high bills for an essential service. For PGandE customers alone, the overpayments may well exceed $1 billion.[4]

4. Review Is Necessary To Resolve A Conflict Among Different Courts As To The Proper Interpretation Of PURPA

Review is necessary to resolve the conflict created by at least two other inconsistent state court decisions interpreting PURPA. In *Kansas City Power & Light Co. v. State Corp. Commission*, 234 Kan. 1052, 1057, 676 P.2d 764, 767-68 (1984), the Kansas Supreme Court held that the Kansas Corporation Commission had no jurisdiction to require Kansas Power and Light Company to purchase electricity from cogenerators at rates higher than avoided cost. But, in *Consolidated Edison Co. v. Public Service Commission*, 472 N.E.2d 981, 63 N.Y.2d 424 (1984), *appeal dismissed*, 470 U.S. 1075 (1985), the New York Court of Appeal

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[4] The California Energy Commission staff testified that the overpayments for one 120 megawatt facility have a net present value of $100 million. (PGandE Motion for Expedited Treatment, Ex. 1.) Almost 200 other power purchase agreements for approximately 4,000 megawatts would be amended to add the new higher prices as well.

held that PURPA did not preempt a state statute which established a purchase rate of 6¢/kWh, concededly above avoided cost, for utility purchases of QF generation. The real parties in interest asserted below that this Court's dismissal of the *Consolidated Edison* appeal leaves each state free to dictate to utilities whatever prices it wishes for utilities to pay for QF generation even if such prices exceed PURPA's avoided cost maximum. Unless this conflict is resolved, there will be national uncertainty in the implementation of PURPA.

II

COMPELLING PGandE TO PAY PRICES THAT EXCEED AVOIDED COST VIOLATES PURPA AND FERC RULES

A. The Commission Cannot Overrule PURPA's Mandate That Utilities Pay No More Than Avoided Cost For QF Power

Compelling a utility to purchase QF power at rates exceeding the utility's avoided cost violates Section 210(b) of PURPA. That Section states that the price prescribed for purchase of QF power "shall be just and reasonable to the electric consumers of the electric utility." (16 U.S.C. § 824a-3(b).) Accordingly, no rule "prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." (*Id.*) Moreover, the Conference Report on PURPA also confirms that Congress did not intend that ratepayers subsidize cogeneration and small power production. That report specifically states:

> The conferees intend that the phrase 'just and reasonable to the electric consumers of the utility' be interpreted in a manner which looks to protecting the interests of the electric consumer in receiving electric energy at equitable rates. (House Conference Report No. 95-1750, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831.)

With respect to Section 210(b), the Report indicates:

> This subsection further states that the utility would not be required to purchase electric energy from a qualifying

> cogeneration or small power production facility at a rate which exceeds the *lower* of the rate described above, namely a rate which is just and reasonable to consumers of the utility, in the public interest, and nondiscriminatory, or the *incremental cost of alternate electric energy*. This limitation on the rates which may be required in purchasing from a cogenerator or small power producer is meant to act as an *upper limit* on the price at which utilities can be required under this section to purchase electric energy. (*Id.* at 7832. (Emphasis added).)

Finally, the conferees specifically added that:

> The provisions of this section are *not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers.* (*Id.*) (Emphasis added.)

It is thus clear that Congress intended that utility customers pay no more than avoided cost and not subsidize QF developers in their production of energy sold to electric utilities.

B. Unlike New York, California Similar to Kansas Has Not Enacted A Statute Which Independently Authorizes The CPUC To Set Prices That Exceed Avoided Cost

Here, unlike in New York, the California Legislature has not enacted a statute which independently authorizes the CPUC to set prices that exceed avoided cost. It is this point which distinguishes *Consolidated Edison* from the instant case. *Consolidated Edison* does not stand for the proposition that other states may mandate prices above avoided costs when implementing PURPA. For two reasons, the *Consolidated Edison* decision, which was appealed to this Court and dismissed, applies only in New York and not in California. First, as a general rule, "[a] summary disposition affirms only the judgment of the court below, and no more may be read into [that] action than was essential to sustain that judgment." (*Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n. 5 (1983).) In other words, a summary disposition's precedential effect extends no further than "'the precise issues presented and necessarily decided by th[e] actions.'" (Id.) Second, and most importantly, the *Consolidated Edison* case addressed a New York statute which specifically authorized a price in excess of avoided

cost, thus giving independent state authority to the New York Public Service Commission to mandate a price in excess of avoided cost.

But California, like most other states, has not enacted such a statute. Instead, it adopted Public Utilities Code section 2821,[5] which authorizes the CPUC to set "equitable charges" for utility purchases of QF generation. Section 2821 therefore is no more than an enabling act that confirmed the CPUC's authority to implement the FERC rules. It closely resembles the statute that was at issue in *Kansas City Power & Light Co. v. State Corp. Commission, supra*, where the Kansas Supreme Court held the state had no authority under Kansas law to require a utility to purchase electricity at rates higher than avoided cost.

By statute, New York mandated a flat 6¢/kwh minimum purchase price. On the other hand, the Kansas statute, similar to California's statute, required utilities to enter into contracts that provided "fair and equitable compensation" for energy delivered to them. (K.S.A. § 66-1,184.) Section 2821, like the Kansas statute, merely authorizes the CPUC to set "equitable charges" for utility purchases of QF power.

Unlike the New York statute, Section 2821 does not authorize the Commission to establish prices that are above avoided cost. Instead, the California statute's history shows that "equitable charges" should be read as a state parallel to the concurrent federal PURPA requirement that electric utility purchases from

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[5] "The commission shall approve and establish equitable charges to be paid by an electrical corporation which purchases electricity or electrical generating capacity, or both, from any private energy producer employing other than a conventional power source for the generation of electricity.

The commission may also specify the prices, terms, and conditions for the purchase or sale of electricity or electrical generating capacity, or both, between an electrical corporation and a private energy producer, and these prices, terms, and conditions, so specified, shall be considered reasonable and prudent for all purposes. The commission may act to specify these prices, terms, and conditions on its own motion or on application of an electrical corporation or a private energy producer."

QFs be at rates which are "just and reasonable" and which do not "exceed the incremental cost to the electric utility of alternate electric energy." (16 U.S.C. § 824a-3(b).) Section 2821 originated in Assembly Bill ("AB") 1403. Its legislative history shows that it was intended to approve the Commission's choice of "avoided cost" as the yardstick for utility purchases of QF power. For example, the analysis of AB 1403, provided by the Assembly Finance, Insurance and Commerce Committee dated January 11, 1980 (Pet. App., p. A-263), states that two Commission decisions both issued December 19, 1979, Decision No. 91109 and Decision No. 91107, "accomplish the intent" of AB 1403. According to the analysis, these two decisions:

> . . . require that rates paid by utilities for electricity produced from a company which utilizes cogeneration technology must be at a utility's "avoided cost." "Avoided costs" reflect the costs of building new power plants to generate electricity that can be purchased elsewhere. (Pet. App., p. A-265.)

Since "avoided cost" prices "accomplish the intent" of Section 2821, it is therefore clear the CPUC has no statutory authority to set rates above avoided cost. Moreover, even the Commission recognized this by its failure to invoke Section 2821 to justify its orders for prices higher than avoided cost. Furthermore, it has never defined "equitable rates" as anything other than "avoided cost." Even the CPUC's Answer to PGandE's Petition for Writ of Review to the California Supreme Court acknowledged that the Commission "chose avoided cost as the standard to be applied in California." (CPUC Answer, pp. 4-5; *accord* Dec. No. 82-12-120, 10 Cal. P.U.C. 2d 553, 558 (1982); Dec. No. 82-01-103, 8 Cal. P.U.C. 2d 20, 40-41 (1982).) And, the Commission has never attempted to deviate from that standard, even in authorizing interim SO4. (Pet. App., p. A-4.) Thus, since the Commission has no statutory authority to mandate prices above avoided cost, its orders compelling PGandE to pay new capacity and energy prices that exceed avoided cost violate PURPA.

C. FERC Rules Not Only Require That Petitioner Be Forced To Pay No More Than Avoided Cost Prices, But Also That Such Costs Be Calculated At Either The Time Of Delivery Or At The Time The Obligation Is Incurred

FERC rules require that QF power sold under a fixed term agreement be priced at avoided cost calculated either at the time of delivery or at the time the power purchase agreement is executed:

> [T]he rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided cost calculated at the time of delivery; or
>
> (ii) The avoided cost calculated at the time the obligation is incurred. (18 C.F.R. § 292.304(d)(2) (1987).)

The new fixed capacity and energy prices that the Commission ordered added to interim SO4 power purchase agreements totally ignored this rule. Since the interim SO4 agreements, in fact, fixed prices in advance, they obviously do not represent avoided cost calculated at the time of the future deliveries. Yet, neither do they represent avoided cost calculated when the power purchase agreements were signed or ordered amended.

No participant in the proceedings below even attempted to demonstrate that the new fixed prices equal current estimates of avoided cost. To the contrary, PGandE showed that the prices greatly exceeded current forecasts of the value of additional, not yet operational resources. In not one of its three decisions below did the Commission purport to find that the new fixed prices represent avoided cost. Nor did it do so in Decision No. 83-09-054 when it originally approved interim SO4. Accordingly, the Commission's orders compelling PGandE to pay the new fixed capacity and energy prices violated PURPA and the FERC rules promulgated thereunder.

D. The New Escalated Firm Capacity Prices Did Not Represent Avoided Cost

The explicit Table E-2 prices for firm capacity deliveries beginning in years 1982 through 1987 are the only prices that the Commission approved in Decision No. 83-09-054 as an acceptable projection of avoided cost. During the 1983 negotiations, the negotiators agreed to use the firm capacity price schedule that the Commission had earlier approved for PGandE's Standard Offer No. 2 ("SO2"). (Dec. No. 83-09-054, slip op. at 55, Finding of Fact 1, 2 (Pet. App., p. A-44).) It contained prices only through 1987. PGandE took the SO2 schedule, incorporated it into proposed interim SO4, and presented the entire standard offer to the Commission for approval. The Commission approved Table E-2 without change. (*Id.*, Ordering Para. 1.) In Decision No. 86-10-038, the Commission ordered PGandE to calculate new prices for firm capacity deliveries beginning in 1988, 1989 and 1990 based on the combustion turbine costs and escalation factors "implicit" in Table E-2. For four reasons, the new prices generated from these old assumptions do not comply with FERC rules.

First, the Table E-2 prices, and not the underlying assumptions, alone represent avoided cost calculated when interim SO4 was approved and the obligation to purchase incurred. Second, the assumptions used to produce the Table E-2 prices had a limited life; they were valid only in 1983 and only then to calculate prices ending in 1987. (*See* Dec. No. 83-10-093, slip op. at 11 (Cal. P.U.C., October 10, 1983); Dec. No. 84-03-092, slip op. at 19 (Cal. P.U.C., March 21, 1984).) The assumptions were soon superseded. Only four months after the Commission approved interim SO4, it issued PGandE's 1984 Test Year Rate Case decision which adopted new assumptions and new prices for firm capacity deliveries beginning in years 1983 through 1988.[6] (*See* D. 83-12-068, Table VI-4, slip op. at 349 (December 22, 1983).)

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[6] The Commission eventually concluded that these firm capacity prices would also overvalue additional QF capacity. On March 19, 1986, the Commission accordingly suspended Standard Offer No. 2. *See* Dec. No. 86-03-069 (Cal. P.U.C., March 19, 1986); Dec. No. 86-05-024 (Cal. P.U.C., May 7, 1986).

Yet, the Commission chose not to make the new prices applicable to the negotiated interim SO4. (*Id.*) Third, as the California Energy Commission recently stated regarding the interim SO4 firm capacity payment option, the assumed gas turbine proxy used to construct the Table E-2 prices is now outmoded:

> The most prevalent option values the QF's capacity by assuming that in the absence of the QF, the utility would meet its growing capacity requirements by constructing a gas turbine power plant. This assumption may have been reasonable for utilities planning to add new capacity in the near term, but since the CPUC placed no limit on the amount of QF capacity that could accept the standard offer, the extended availability of these standard offers implied that there was no limit to the amount of capacity needed by the utilities. By the time the CPUC moved to suspend the long-run standard offers, thereby correcting this erroneous and unintended implication, far more QF capacity had signed the standard offers than the utilities could possibly need for the foreseeable future. (1986 Electricity Report, pp. 5-51, 5-52.)

Finally, even the old assumptions underlying Table E-2 are insufficient to generate the new, escalated prices the Commission ordered. The Table E-2 prices through 1987 were based on projections of capacity costs for thirty years, or through year 2017. Generating new prices for three more years—1988, 1989 and 1990—requires new assumptions for capacity values in 2018, 2019 and 2020. The value of capacity for these years is in no way implicit in Table E-2. The Commission never purported to approve forecasted capacity values for those years. Accordingly, it never determined that the new firm capacity prices represent avoided cost. Those prices therefore do not comply with PURPA or FERC rules.

E. By The Commission's Own Admission, It Never Found That The New Extended Energy Prices Represent Avoided Cost, And This Failure Violated PURPA And FERC Rules

By its own admission, the Commission never found that the new fixed energy prices represented avoided cost. For example, in Decision No. 86-10-038, slip op. at 12 (Pet. App., p. A-136), the

Commission stated there was "no accepted methodology" to extend Table B-1. It further stated in Decision No. 86-12-104 that Table B-1 was "based on negotiations between the parties, which cannot be replaced without long and complex hearings for the sole purpose of adopting a workable methodology." (Pet. App., p. A-146.)[7] And finally in Decision No. 83-09-054, slip op. at 10 (Pet. App., p. A-7), the Commission repeatedly stated it had no evidentiary record to do anything other than accept or reject that to which the negotiators had agreed.

The last price in Table B-1 is 13.14 cents per kilowatt hour ("¢ /kw") for 1997 energy deliveries. The current avoided cost forecast of the Commission's Public Staff Division is only 4.79¢ /kwh for 1998, 5.29¢/kwh for 1999 and 5.93¢/kwh for 2000. (PGandE's Protest, Ex. 3) The interim SO4 negotiators agreed to a price of 13.14¢/kwh for 1997 alone; they never agreed to pay that same price in 1998, 1999 and 2000 as well. Nonetheless, the Commission ordered PGandE to pay the last negotiated price in Table B-1 for three additional years. Extending Table B-1 for an additional three years, in the admitted absence of any determination or agreement that the last negotiated price represents avoided cost, flagrantly violates PURPA and FERC rules.

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[7] The Commission made the same statements regarding extension of the fixed as-delivered capacity prices in Table D-2. However, interim SO4 already gave QFs the right to retain the last Table D-2 price as a floor price for the rest of their term of agreement. Thus, unbeknownst to the Commission, the effect of the Commission's extension of the last price in Table D-2 was simply to reconfirm what interim SO4 had already explicitly provided.

III

THE NEW FIXED ENERGY AND CAPACITY PRICES WERE NOT MERE CONTRACT INTERPRETATIONS WHICH NEEDED NO EVIDENTIARY RECORD

A. Since There Was No Evidentiary Record, The Commission's Interpretation Of The Agreements Is Not Binding On Appeal

The Commission's findings regarding the "intent" of interim SO4 rest on no evidentiary record. As the Commission itself has acknowledged, "[s]ince the present interim SO4 is a negotiated offer, there was no evidentiary record." (Dec. No. 85-04-075, slip op. at 19 (Pet. App., p. A-84.).) The Commission even told the utilities to delay executing interim SO4 until the period for petitioning for rehearing of its decision approving interim SO4 had expired "in view of our acting without an evidentiary record upon which to make findings of fact sufficient to issue a decision to withstand judicial review." (Dec. No. 83-09-054, slip op. at 54 (Pet. App., p. A-43.).)

The Commission did not even purport to conduct any evidentiary hearings prior to issuing its 1986 decisions extending the interim SO4 price schedules. In its Answer to PGandE's Petition for Writ of Review to the California Supreme Court, the Commission points out that the QFs themselves argued that no evidentiary hearings were required. (CPUC Answer, p. 10.) PGandE similarly did not request evidentiary hearings. Thus, all parties below chose to rest upon the language of interim SO4 and the authorizing decisions. None elected to invoke the aid of any extrinsic evidence.

Since the Commission's decisions rest on its interpretation of interim SO4 and its prior decisions, not upon extrinsic evidence and a record developed through evidentiary hearings, the questions presented below were solely questions of law which the California Supreme Court should have independently determined, but refused to do so. Unless the interpretation of a written document turns upon the credibility of extrinsic evidence, the reviewing court must independently interpret its legal significance. (*First National Bank of Fayetteville v. Smith*, 508 F.2d

1371, 1374 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975). And, no deference is due to the Commission's interpretation of the legal significance of the written material it relied upon to justify extending the interim SO4 price schedules. (*Coca-Cola Co. v. Atchinson, Topeka and Santa Fe Railway Co.*, 608 F.2d 213, 218 (5th Cir. 1979).)

The general rule that a public utilities commission is not charged with the enforcement of private contracts has been affirmed in numerous states.[8] For example, in *Afton Energy, Inc. v. Idaho Power Co.*, 729 P.2d 400 (Idaho 1986), the Idaho Supreme Court affirmed the Idaho Public Utilities Commission's refusal to interpret a power purchase agreement between a utility and a qualifying facility entered into pursuant to PURPA. The Idaho Court stated:

> Generally, construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not in

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[8] *General Cable Corp. v. Citizens Util. Co.*, 27 Ariz. App. 381, 555 P.2d 350, 355 (1976) ("construction and interpretation to be given to legal rights under a contract resides solely within the courts and not with the Corporation Commission"); *Wilshire Construction Co. v. Union Electric Co.*, 463 S.W.2d 903, 905 (Mo. 1971) (meaning of contracts based on rate schedule filed with PUC matter for courts, not PUC); *Williams Electric Coop. v. Montana-Dakota Util. Co.*, 79 N.W.2d 508, 517 (N.D. 1956); *Ranft v. Columbia Gas of Ohio, Inc.*; 58 Ohio App. 2d 39, 388 N.E. 2d 759, 761 (1978) (although utility terminated service pursuant to PUC order, courts, not PUC, had power to determine legal rights and liabilities under affected contract); *Gibson v. Elmor City Tel. Co.*, 411 P.2d 551, 553 (Okl. 1966); *Lacy v. East Broad Top R.R. & Coal Co.*, 168 Pa. Super. 351, 77 A.2d 706, 710 (1951); *Amerada Petroleum Corp. v. R.R. Comm'n*, 395 S.W.2d 403, 406 (1965); *Appalachian Power Co.* v. *John Stewart Walker, Inc.*, 214 Va. 524, 201 S.E.2d 758, 764 (1974) (although PUC had power to issue order ending utilities' obligation under pre-existing oral contracts to install underground electrical service free of charge, PUC had no power to adjudicate common law contract claims which arose before the order); *Benwood-McMechen Water Co. v. City of Wheeling*, 121 W.Va. 373, 4 S.E.2d 300, 303 (1939) (PUC has authority to pass on whether utility may enter into contract, but once contract is signed, its interpretation is to be determined by the courts).

> the Public Utilities Commission. This is true notwithstanding that the parties are public utilities or that the subject matter of the contract coincides generally with the expertise of the commission. If the matter is a contractual dispute, it should be heard by the courts.

Interpretation of written documents by courts, rather than by administrative agencies, is a general principle of administrative law. In *Cincinnati Gas and Electric Co. v. Federal Energy Regulatory Commission*, 724 F.2d 550, 554 (6th Cir. 1984), the court summarized the standard of review for administrative interpretation of contracts. At issue in *Cincinnati Gas & Electric* was FERC's interpretation of a transmission "wheeling" agreement between utilities. There the court stated:

> Under general contract law, interpretation of a contract is a question of law, not fact. "Questions of law, unlike questions of fact, are freely reviewable by the court." An agency's interpretation of a contract, therefore, may be reviewed by a court without special deference. (Citations omitted).

On the other hand, it is generally true that "courts do defer to contract interpretation based upon an agency's factual findings or technical expertise." (*Id.*) But, where the administrative decision is based "on the language of the Agreement rather than any factual or technical grounds, [a] Court need not defer to the Commission's interpretation but can review it freely." (*Id.*) Since the CPUC based its decision on the language of interim SO4, and did not consider extrinsic evidence or invoke any technical expertise,[9] it determined the legal significance of the agreement and the appropriate standard is *de novo* review.[10] It is well-settled that in

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[9] *See Franz v. Bd. of Medical Quality Assurance*, 31 Cal.3d 124, 140 (1982) ("due process requires, when in an adjudication an agency intends to rely on members' expertise to resolve legislative-fact issues, that it notify the parties and provide an opportunity for rebuttal").

[10] *Accord J.I. Case Co. v. NLRB*, 321 U.S. 332, 340 (1944); *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922) (construction of tariff presents question of law absent extrinsic evidence); *Swearingen Aviation Corp. v. NLRB*, 568 F.2d 458, 463 (5th Cir. 1978) (Despite general deference to NLRB findings of fact, "[w]here, as in this case,

reviewing agency decisions of questions of law, courts "can determine such questions de novo." (*First National Bank in Sioux Falls v. National Bank of South Dakota,* 667 F.2d 708, 711 (8th Cir. 1981).)

The Commission has stated that the standard offers are to be a "contract in the 'traditional' legal sense," and interpreted accordingly. (Dec. No. 85-06-163, slip op. at 29 (Cal. P.U.C., June 21, 1985).) Therefore, an independent determination of the meaning of interim SO4 should be made because the situation presented here is the same as when an appellate court reviews a trial court's interpretation of a contract in the absence of extrinsic evidence.

B. The Clear Terms Of Interim SO4 Did Not Allow The Commission To Imply New Fixed Prices.

The Commission claimed the intent of interim SO4 was to give QFs price certainty and justified the new fixed prices accordingly. But interim SO4 contains no permanent price guarantee; its very name belies that proposition. It was intended to be available for only a limited period. It prescribed prices for only a limited period. The obvious uncertainties inherent in avoided cost forecasts, and lack of any evidentiary testing of the negotiated price package, precluded unlimited price assurance.

As a result, interim SO4 constituted a mere proposal to enter into a power purchase agreement only at the fixed prices explicitly quoted. QFs accepted interim SO4 by filling out interim SO4, signing it, and submitting it to PGandE. PGandE had no control over which of the various price options a QF opted to select. But, a QF's unilateral decision to begin operation after 1987 gave it no right to change the express prices of the offer. Thus, interim SO4 only offered price certainty to QFs who began operation in time to receive the fixed prices contained in the price schedules.

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the crucial issue is the legal significance of a written statement, neither the statute authorizing review nor respect for the Board's expertise so limit our review."); *Beryllium Corp. v. United States,* 449 F.2d 362, 366 (Ct.Cl. 1971); *New York Susquehanna & W. R.R. Co. v. Follmer,* 254 F.2d 510, 513 (3rd Cir. 1958).

C. Article 2 Of Interim SO4 Conclusively Establishes That The Price To Be Paid QFs Is Set Forth In The Price Schedules

Moreover, Article 2 of interim SO4 conclusively establishes that the only fixed prices to which QFs are entitled are those that are contained in the price schedules. Although totally ignored by the Commission in each of its three decisions, Article 2 prohibits precisely the price change that the Commission ordered. Article 2 states:

> The prices to be paid Seller for energy and/or capacity delivered pursuant to this Agreement have *wholly* or *partly* been fixed at the time of execution. Actual avoided cost at the time of energy and/or capacity deliveries may be substantially above or below the prices fixed in this Agreement. Therefore, *the Parties expressly commit to the prices fixed in this Agreement for the applicable period of performance and shall not seek to or have a right to renegotiate such prices for any reason.* As part of its consideration for the benefit of fixing *part or all* of the energy and/or capacity prices under this Agreement, *Seller waives any and all rights to judicial or other relief from its obligations and/or prices* set forth in Appendices B [energy], D [as-delivered capacity], and E [firm capacity] or modification of any other term or provision for any reasons whatsoever. (Pet. App., p. A-187.) (Emphasis added.)

The clear language of Article 2 must prevail over any contrary meaning the Commission may elect to give that language. "It is clear that implication that would otherwise be reasonable should not be made when the contrary is indicated in clear and express words." (*Clutts v. Southern Methodist University*, 626 S.W.2d 334, 336 (Tex. App. 1981) quoting Corbin, 3A *Corbin on Contracts* § 564 at 298 (1960).) "Courts will not disregard the plain language of a contract or interpolate something not contained therein." (*Standard Oil Company v. Ogden & Moffett Co.*, 242 F.2d 287, 292 (6th Cir. 1957).) Article 2 prohibits any changes to the fixed prices. This alone makes untenable the Commission's implication of new fixed prices.

D. Since The Commission's Incorrect Application Of PURPA And FERC Rules Will Most Likely Cost California Ratepayers Over $1 Billion In Unnecessary Rates, It Is Critical That This Court Accept Review

This Court should grant certiorari "in view of the fiscal importance of the question." (*Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959).) Here, the Commission's refusal to adhere to PURPA and FERC rules will in all likelihood cost California ratepayers more than $1 billion. In *United States v. Zazove*, 334 U.S. 602, 614-615, n. 17 (1948), this Court observed there that "if settlement were required to be made pursuant to the Circuit Court's holding would amount to approximately 1.8 billion dollars." And, in *Commissioner of Internal Revenue v. Standard Life & Accident Insurance Co.*, 433 U.S. 148, 151, n. 5, (1977), the Court again observed, in a case involving the net value of unpaid life insurance premiums: "We are informed that substantially more than $100 million is in dispute." Thus, this Court is not unmindful that erroneous decisions may have enormous financial consequences. Unless the decision below is corrected by this Court, it will in all probability cost PGandE's ratepayers $1 billion, if not more. This is egregious, especially since the record below is wholly lacking in any evidence to support this enormous gift of ratepayer funds to QFs.

Finally, it must be emphasized again that the Commission's orders compel PGandE to pay new, excessively high prices to QFs whose projects will not begin operations until after 1987 and who, for the most part, signed interim SO4 just before it was withdrawn. This is especially unjust since the Commission has never determined that the new prices represent a reasonable projection of PGandE's avoided cost. To the contrary, these new fixed prices are more than double current estimates of the future value of incremental resources in 1988 and beyond. By encouraging otherwise uneconomic projects to proceed, the decisions exacerbate the substantial generating capacity surplus that the California Energy Commission has projected for the next decade. An enormous wealth transfer from PGandE's ratepayers to the QF industry will result if the decision below is allowed to stand.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion below.

Respectfully submitted,

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